

## QUESTION TAKEN ON NOTICE

ADDITIONAL ESTIMATES HEARING: 13 FEBRUARY 2012

IMMIGRATION AND CITIZENSHIP PORTFOLIO

(AE12/0237) Program 3.1: Border Management

Senator Xenophon asked:

Migration Regulation 2.40(4) Persons must not work in Australia uses the construction “does not perform work in Australia (other than work of a kind that he or she normally performs during the course of his or her duties...” How do you distinguish between work as an international flight crew member and a domestic flight crew member?

*Answer:*

There is no express authority in the Migration Act or Regulations for the holder of an Special Purpose Visa (SPV) to work as crew on domestic air services. However, subregulation 2.40(4) of the *Migration Regulations 1994* effectively places restrictions on the kind of work that may be performed by certain SPV holders, including an *airline positioning crew member* and an *airline crew member*, as follows:

**(4)** A person included in a class of persons specified in paragraph (1)(d), (e), (f), (g), (j), (l) or (m) has a prescribed status only while he or she does not perform work in Australia (other than work of a kind that he or she normally performs during the course of his or her duties as a person of a kind referred to in the relevant paragraph).

Under subregulation 2.40(4), if an *airline positioning crew member* or an *airline crew member*, as defined in subregulation 1.03, performs work in Australia that is not of a kind that he or she normally performs during the course of his or her duties as one of those persons, then they will cease to hold a prescribed status. The SPV held by that person will then cease to be in effect at the end of the day on which they cease to hold a prescribed status (s 33(5)(a)(i) of the Act refers).

There is no other restriction on the type of work that may be performed by the holder of an SPV. It follows that an *airline positioning crew member* or an *airline crew member* will only cease to hold a prescribed status for the purposes of s 33(2)(a) of the Act, under subregulation 2.40(4), if he or she performs work in Australia that he or she does not normally perform during the course of his or her duties as an *airline positioning crew member* or an *airline crew member*.

The relevant effect of subregulation 2.40(4) is that an *airline positioning crew member* or an *airline crew member* is ‘permitted’ to perform work in Australia if the work is of a kind that he or she normally performs as an *airline positioning crew member* or an *airline crew member*.

The kind of work normally performed by a person in the course of his or her duties as an *airline positioning crew member* or an *airline crew member* is a matter that must be determined on the facts of each particular case.

Nonetheless, these provisions were not designed for foreign airline crew to perform identifiably separate tasks from their international airline crew work in Australia. Specifically, it is not appropriate for foreign airline crew to operate on domestic sectors in Australia which have no reasonable connection to an international service. Any work performed in relation to a domestic leg of an international flight should be incidental to and in no way separate from the international sector.

DIAC has clarified this expectation with the Qantas Group and will also be communicating with industry more broadly. It may be appropriate to consider monitoring arrangements with airlines to ensure this expectation is met. It is also open to DIAC to consider regulatory changes as appropriate. Any such consideration would need to carefully balance domestic considerations against international commitments and reciprocity.